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No. 84-0315

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER,
VERMONT DEPARTMENT OF
MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

REPLY TO PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY TO PETITION FOR REHEARING 1

I. *HOOPER v. BERNALILLO COUNTY ASSESSOR*, ... 1
NO. 84-231 (U.S. OCT. 9, 1984) IS INAPPOSITE, AND THE COURT SHOULD AFFIRM ITS ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

II. THE COURT SHOULD AFFIRM ITS ORDER. 5
DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION UNDER THE COMMERCE CLAUSE.

III. CONCLUSION: THE COURT SHOULD DENY THE. . . .8
PETITION FOR REHEARING AND SHOULD AFFIRM ITS ORDER DISMISSING THIS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

TABLE OF AUTHORITIES

CASES *PAGE*

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935) 6

Allied Stores of Ohio Inc. v. Bowers, 358 U.S. 522 (1959) . . . 3

Austin v. New Hampshire, 420 U.S. 656 (1975) 8

Brown v. Houston, 114 U.S. 622 (1885). 5

Commonwealth Edison v. Montana, 453 U.S. 609 (1981) 5

Evansville-Vandenburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972) 6

Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934). 5

Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963) 5, 8

Henneford v. Silas Mason Co., 300 U.S. 577 (1937). 3, 5

Hooper v. Bernalillo County Assessor, No. 84-231 (U.S. October 9, 1984) 1, 4

J.C. Penney Co., Inc. v. Hardesty, 264 S.E. 2d 604 (W. Va. 1980) 4, 5

Leverson v. Conway, ___ *Vt.*___, 481 A. 2d 1029 (Vt. 1984). 1, 3, 4, 8

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1977) 7

Shapiro v. Thompson, 394 U.S. 618 (1968) 4, 7

Williams v. Conway, 84-492 (U.S. Dec. 10, 1984). 8

Vermont Statutes ***PAGE***

Vt. Stat. Ann. tit. 23, § 301 1

Vt. Stat. Ann. tit. 32, § 8901 . . . . . 1, 2, 5

Vt. Stat. Ann. tit. 32, § 8902(2). 1

Vt. Stat. Ann. tit. 32, § 8903 1

Vt. Stat. Ann. tit. 32, § 8905(b). 1

Vt. Stat. Ann. tit. 32, § 8911(6). 2

Vt. Stat. Ann. tit. 32, § 8911(9). 2, 3, 4

REPLY TO PETITION FOR REHEARING

I. *HOOPER V. BERNALILLO COUNTY ASSESSOR*, NO. 84-231 (U.S. OCT. 9, 1984) IS INAPPOSITE, AND THE COURT SHOULD AFFIRM ITS ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The Petition for Rehearing, like the Jurisdictional Statement, demonstrates appellant's misinterpretation of the language and administration of the Vermont motor vehicle purchase and use tax, Vt. Stat. Ann. tit. 32, § 8901 *et seq.* Appellant repeatedly argues that the case involves a tax exemption "denied newcomers because they were not residents of the taxing state [Vermont] at some time in the past," Petition at 2, and from this premise asserts that his right to travel has been infringed. Because the premise is incorrect a substantial federal question is not presented.

The Vermont Supreme Court held that it was the act of "registration, and not the move to Vermont [which] triggered the use tax obligation." *Leverson v. Conway*, ___ Vt. ___, 481 A. 2d 1029, 1033 (Vt. 1984). The tax is collected from the user "with the registration application . . . at the time of first registering or transferring a registration to such motor vehicle as condition precedent to registration thereof." Vt. Stat. Ann. tit. 32, § 8905(b). All residents are required to register their vehicles if they desire to use them in the state, Vt. Stat. Ann. tit. 23, § 301, and registration of a motor vehicle is "conclusive evidence that the purchase and use tax applies . . . ." Vt. Stat. Ann. tit. 32, § 8903(c). Hence, liability for the tax does not arise until registration is sought. In appellant's case, the liability for the use tax arose six months after he had accepted employment here. Vt. Stat. Ann. tit. 32, § 8902(2). Prior to that time he had the full use and enjoyment of his automobile in Vermont.

The purpose of the purchase tax and use tax components is to raise revenue "to improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of

those systems and to pay the cost of administering [the tax]." Vt. Stat. Ann. tit. 32, § 8901. The incidence of the tax is upon those who are likely to primarily use this state's facilities - those who register their vehicles in Vermont. The Vermonter who purchases a car in Vermont is liable for the 4% motor vehicle purchase tax. If the Vermonter were to purchase the car in Wisconsin, appellant's prior residence and a reciprocal state, he would be exempt from its sales tax but would nonetheless be liable for this state's 4% use tax upon registration here. If the Vermonter were to register the vehicle in Wisconsin he would not receive credit in Vermont for either the Wisconsin sales or use tax, and would be liable to Vermont for the 4% use tax upon its subsequent registration in this state.[1] Under each scenario a Vermont resident pays his full statutory share for using Vermont's highway facilities - regardless of where the car is purchased. All that Vermont requests of the appellant is that he, too, pay the 4% tax (based upon low book value as of the date of registration). "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates.

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[1] Appellant contends that there is "nothing in the text of [Vt. Stat. Ann. tit. 32, § 8911(9)] or in any other source of Vermont law " to support this assertion. Petition at 9, n. 2. The Commissioner of Motor Vehicles, the appellee, is vested with the authority to interpret and administer the Act. Vt. Stat. Ann. tit. 32, § 8901. Although regulations have not been formally promulgated, the Commissioner has interpreted the repeal of Vt. Stat. Ann. tit. 32, § 8911(6) (the provision which had wholly exempted from the use tax persons who had purchased, registered and used a pleasure car in another state for at least 30 days), as a further manifestation of legislative intent that credit not be afforded when a vehicle had been registered in another state. If the Act were not, in fact, administered as represented by the Commissioner, new residents would be treated differently from longstanding residents. The record, however, simply does not substantiate appellant's impression that the tax is not administered as represented.

The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). "The tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using these highways." *Leverson v. Conway*, 481 A.2d at 1034.

Vt. Stat. Ann. tit. 32, § 8911(9) provides that the motor vehicle purchase and use tax is inapplicable to,

> "Pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax, the tax due shall be the difference."

Thus, a Vermont resident who purchases a car in a reciprocal state for first use in Vermont will receive a credit for tax paid to that reciprocal state. The legislature has the authority to grant exemptions from a tax, unless the classification is wholly arbitrary. *Allied Stores of Ohio Inc. v. Bowers*, 358 U.S. 522, 527 (1959). The obvious objective of such an exemption is to encourage interstate commerce: Residents desiring to purchase a pleasure car for first use in Vermont may shop in the several reciprocal states without having to consider the tax consequences. (Likewise, residents of reciprocal states can shop in Vermont assured that credit will be afforded in the home state if a tax is paid here.) Having already purchased, registered, and used his car in another state at the time he became a Vermont resident, however, there is no rational reason for extending the § 8911(9) credit to appellant. As the court stated,

> "With respect to new residents, such as [appellant] who bring their cars with them they are beyond the reach of any

> policy of encouragement to purchase in this state and there is no reason to exempt them from making a fair contribution to the maintenance and improvement of Vermont's highways."

Leverson v. Conway, 481 A.2d at 1035.

In view of the purpose of the tax, and the purpose of the § 8911(9) credit, appellant's liability should properly be compared to that of any other Vermont resident who purchased the identical car in Vermont at the same time that appellant became a resident. In both cases a 4% tax is imposed and the same amount is exacted.

Accordingly, the case at bar is quite unlike *Hooper v. Bernalillo County Assessor, supra*. There, a benefit was conferred only upon those who had established state residency by a particular date. Here, the § 8911(9) credit is available to any person - regardless of how long or when residency is established - who purchases a vehicle in a reciprocal state that happens to tax non-residents[2] (provided that it is first registered in Vermont). Unlike *Hooper*, the appellant did not receive the credit, not "because he had not been a Vermont resident at some time in the past," Petition at 2-3, but because it would have resulted in preferential treatment. The right to travel does not include a right to preferential treatment. *Shapiro v. Thompson*, 394 U.S. 618 (1968).

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[2]It has been observed that "all states appear to provide that an out-of-state purchaser of an automobile may avoid the payment of a sales tax in the state of purchase by using a temporary license plate which will be valid long enough for him to return to his home state." *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E. 2d 604, 613 (W. Va. 1980). As a practical matter it would thus appear that the current availability of the § 8911(9) credit is more a matter of form than substance, for even if the vehicle were purchased in a reciprocal state the Vermonter would still be liable for this state's 4% use tax. To extend the credit to newcomers who bring their vehicles with them would therefore enable them to escape payment for the use of this state's facilities at the expense of all other residents.

II. THE COURT SHOULD AFFIRM ITS ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION UNDER THE COMMERCE CLAUSE.

It is important to emphasize that appellant had purchased, registered, and used his automobile in Wisconsin before he established residency in Vermont, and before he became legally obligated to register it here. Hence, the facts establish that appellant's activities did not constitute interstate commerce, but that he was involved in two separate intrastate events, one in Wisconsin and one in Vermont. See *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E. 2d 604 (W. Va. 1980).

The Court has long recognized that the Commerce Clause does not prevent a state from imposing a non-discriminatory tax on the possession of property, *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17 (1934) or on the use of property, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), even though it may subsequently enter interstate commerce. Similarly, articles that have been transported interstate and which have come to rest are no longer held to be within that stream of commerce, and can be subjected to a non-discriminatory use tax, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963), or property tax. *Brown v. Houston*, 114 U.S. 622 (1885).

In *Henneford, supra*, the Court upheld a compensating use tax, noting that everyone, regardless of where the article may have been purchased, received credit for sales tax paid thereon. Unlike the tax *sub judice*, which is user-based, and the proceeds of which are earmarked for specific highway pruposes, Vt. Stat. Ann. tit. 32, § 8901, the tax in *Henneford* was a general revenue raising device. The distinction between a user-based levy and other taxes was recognized in *Commonwealth Edison v. Montana*, 453 U.S. 609, 621, 622 n. 12 (1981) where it was stated,

> "Consequently, in reviewing appellant's contentions, we put to one side those cases in which the court reviewed challenges to 'user fees', or 'taxes' that were designed and defended as a

> specific charge imposed by the State for use of state-owned or state-provided transportation or other facilities and services . . . . As the court has stated, 'such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes'."

Nor is there any logic in requiring Vermont, under the Commerce Clause, to extend the credit to appellant in these circumstances. Appellant chose to buy his car in Wisconsin while he was a resident of that state and with the intention of using it there. He was liable for its sales tax, and by paying that tax and complying with Wisconsin's registration laws obtained privileges of a scope and nature to which no Vermont resident could obviously lay claim. That appellant may have used it there only briefly is of no moment: "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 U.S. 285, 289 (1935).

It is, of course, purely conjectural whether other states may respond to the affirmation of the Vermont Supreme Court's decision by repealing credits, Petition at 4, which they were never constitutionally obligated to bestow. Indeed, similar contentions were rejected in *Evansville-Vandenburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707, 721 (1972), (holding that a governmental charge of $1 on interstate and intrastate airline passengers did not violate the Equal Protection Clause, Commerce Clause, or the right to travel), where the Court stated that it is,

> "settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike. The principle

that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. See *Shapiro v. Thompson*, 394 U.S. 618 (1969). The facility provided at public expense aids rather than hinders the right to travel." *Id.*, at 714.

* * *

"[T]here is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel." *Id.*, at 722.

On the other hand, reversal would result in a radical intrusion into the reserved power of the states, and judicial interference with matters which traditionally have been held to be within the authority and expertise of the legislature. As stated in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1977),

"While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."

Appellant did nothing commercial; he simply established Vermont residency, and as a resident became liable for this state's use tax. To hold that the Commerce Clause is implicated and that the credit is mandated simply because "property may be moved from state to state many times," and "may be subjected to multiple use taxes," Petition at 5, is to effectively overrule the fundamental power and necessity of the state to finance its services by way of taxation. It ignores the services provided by a state in deference to a methodology which will favor and enrich the state of purchase, even though the item may be used at considerable expense to the taxpayers of another state.

"Equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963). Appellant's Commerce Clause challenge, "made seemingly attractive by high-sounding suggestions of inequality and unfairness," *Austin v. New Hampshire*, 420 U.S. 656, 670 (1975) (Blackmun, J., dissenting) ignores not only the equality of treatment by Vermont of those who are similarly situated, but also the very purpose of the tax, and the laudable purpose of the limited credit. Accordingly, a substantial federal question is not presented.

III. CONCLUSION: THE COURT SHOULD DENY THE PETITION FOR REHEARING AND SHOULD AFFIRM ITS ORDER DISMISSING THIS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

In response to the Jurisdictional Statement appellee submitted a Motion to Dismiss or Affirm. In response to the Jurisdictional Statement filed in *Williams v. Conway*, 84-592 (U.S. Dec. 10, 1984), appellee waived the Motion to Dismiss or Affirm, referring the Court to the fact that the Motion had been filed in the case at bar, and that the Vermont Supreme Court's decision in *Williams* simply provided that the case was controlled by its decision in *Leverson*. The Court dismissed this appeal but noted probable jurisdiction in *Williams*.

If probable jurisdiction is noted in *Williams*, it follows

that probable jurisdiciton should also be noted in *Leverson*. For the reasons set forth above, however, and in the Motion to Dismiss or Affirm, it is respectfully submitted that substantial questions are not presented in either of these companion cases.

Respectfully submitted,

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